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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF STATE OF
NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF NEBRASKA.

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM.**

L. J. TePoel,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

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THE DISTRICT OF NEBRASKA.

MOTION TO DISMISS OR AFFIRM.

(Filed July 3, 1940.)

SIRS:

Please take notice that upon defendants'-appellants' petition for appeal, order allowing appeal, citation on appeal, cost bond on appeal, statement directing attention to Rule 12, subsection (3), assignment of errors and jurisdictional statements, including the papers annexed thereto, heretofore filed herein by defendants-appellants, the undersigned hereby move pursuant to Rule 12, subdivision (3) of the Rules of the Supreme Court of the United States for an

order dismissing the appeal herein or affirming the order appealed from upon the following grounds:

1. That the order appealed from is not a final decree granting or denying a permanent injunction and therefore is not within the provisions of Sections 238 and 266 of the Judicial Code (28 U. S. C. Secs. 345, 380).
2. That the appeal is solely from a discretionary order of this Court denying a motion for a re-hearing or for a new trial and that such order is not reviewable by the Supreme Court of the United States.
3. That no abuse of discretion on the part of the District Court in the entry of said order is alleged or assigned.
4. That the defendants' "motion for a new trial with twenty two affidavits attached" is not a proper part of the jurisdictional statement and should be disregarded by the Court in view of the fact that the order entered upon such motion is not reviewable.

Dated: Omaha, Nebraska, July 3, 1940.

Yours, etc.,

L. J. TEPOEL,
Solicitor for Complainants,
Office & P. O. Address,
605-8 Farnam Building,
Omaha; Nebraska.

To:

WALTER R. JOHNSON, Esq.,
Attorney General of Nebraska,
Attorney for Defendants-Appellants,
Lincoln, Nebraska.

WILLIAM J. HOTZ, Esq.,
JOHN RIDDELL, Esq.,
ANDREW BENNETT, Esq.,
Of Counsel.

**MEMORANDUM OF PLAINTIFFS APPELLEES IN
OPPOSITION TO JURISDICTIONAL STATEMENT
AND IN SUPPORT OF MOTION TO DISMISS OR
AFFIRM.**

(Filed July 3, 1940.)

In this suit brought by appellees under Section 266 of the Judicial Code (Tit. 28 U. S. C. Sec. 380), the United States District Court of the District of Nebraska, Lincoln Division, consisting of Hon. Archibald K. Gardner, Circuit Judge, and Hons. Thomas C. Munger and J. A. Donohoe, District Judges, entered a decree on *January 25, 1940* restraining appellants from enforcing the provisions of Chapter 138 Nebraska Session Laws 1937, p. 488.

On February 5, 1940, appellants filed a "motion for new trial with twenty two affidavits attached." A copy of the motion papers is annexed to appellants' jurisdictional statements.

The appellants' motion was heard by the District Court on March 25, 1940, and the motion was denied on March 28, 1940, at which time the following order was entered:

"The Defendants' Motion for a New Trial, and for other relief, filed on February 5, 1940, in the above entitled case, which has heretofore been submitted to the Court, consisting of Archibald K. Gardner, Circuit Judge, Thomas C. Munger, District Judge and J. A. Donohoe, District Judge is hereby overruled."

The appeal herein is directed to the last mentioned order and not to the decree of injunction entered by the Court on January 25, 1940.

The citation on appeal herein directs appellees to show cause "why the decree rendered against the said appellants on *March 28, 1940*, as in said appeal mentioned, should not be corrected . . ." No order or decree other than that of March 28, 1940 is mentioned in the citation.

The petition for appeal likewise is directed only to the order of March 28, 1940. The decree entered on January 25, 1940 is mentioned, but there is no request that said decree be reviewed except insofar as such decree was attacked upon the motion for a new trial. The portion of the petition praying for an order allowing an appeal, reads as follows:

"1. The above captioned defendants and appellants petition Your Honors for an order allowing an appeal from the order overruling their motion for new trial and rehearing, and to correct the decree entered, in the United States District Court, for the District of Nebraska, Lincoln Division, on March 28, 1940."

Appellees are filing herewith a motion to dismiss or affirm under Rule 12, subdivision (3) of the Rules of the United States Supreme Court, on the ground that the order appealed from is an order denying a motion for a new trial or a rehearing and is therefore not a final decree granting or denying a permanent injunction within the meaning of Sections 238 and 266 of the Judicial Code (28 U. S. C. Secs. 345, 380) and that in any event, the order entered upon the motion for a new trial is discretionary and no abuse of discretion on the part of the District Court is assigned as error.

Point I.

The Appeal Should Be Dismissed for Lack of Jurisdiction.

Appellants rely upon Sections 238 and 266 of the Judicial Code (28 U. S. C. Secs. 345, 380) to support the jurisdiction of the United States Supreme Court. Section 238 reads in part as follows:

"Sec. 345 (Judicial Code, section 238, amended.)
Appellate jurisdiction from decrees of United States District Courts. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a dis-

trict court may be had where it is so provided in the following sections and not otherwise:

(3) Section 380 of this title."

Section 266 (28 U. S. C. Sec. 380) provides that "A direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit", i. e., a suit where an application for injunction to restrain enforcement of a State statute is heard by a district court of three judges.

The appeal herein is not one from a final decree granting or denying a permanent injunction, it is from the order denying a motion for a new trial.

Appellants can not attack the injunction decree upon an appeal from such an order. The only question involved upon such an appeal is whether or not the trial court abused its discretion.

In *National Shoe Co. v. Nathews*, 92 F. (2d) 751 (C. C. A. 5) the court dismissed an appeal from an order denying a motion to vacate a prior order granting a bankrupt's discharge. In that case as in the case at bar, the assignment of errors was directed to the final order itself as well as to the order denying the motion for a new trial. The court held that since the petition for appeal recited that appellant was appealing from the later order (denying the motion to vacate) rather than from the earlier order (which was on the merits), the earlier order could not be reviewed. The court held that the matter was jurisdictional, and further that an appeal could not be taken from the discretionary order denying the motion to vacate and thereupon dismissed the appeal. Said the court at p. 753:

"The appeal having been confined to the order of January 13, 1937, which was an order denying a rehear-

ing, it must be dismissed as not presenting any matter subject to review by this court."

Point II.

The Order of March 28, 1940, Denying the Motion for a Rehearing Was Not Appealable.

Almost a century ago, the Supreme Court laid down the rule in an opinion by Mr. Justice Story that no appeal lies from an order denying a rehearing since that matter rests in the sound discretion of the trial court. *Brockett v. Brockett*, 2 How. 238, 240. In that case there was also an appeal from the final decree itself. The Court entertained the appeal from the final decree but refused to consider the appeal from the order denying a rehearing. See in accord:

Indianapolis, etc., R. R. v. Horst, 93 U. S. 291, 301;
San Pedro, etc., Co. v. United States, 146 U. S. 120, 137;
Steines v. Franklin County, 14 Wall. 15;
In re Annin & Co., 95 F. (2d) 381, 382 (C. C. A. 2).

The motion to dismiss the appeal or in the alternative to affirm should be granted.

Respectfully submitted,

L. J. TEPOEL,
Solicitor for Plaintiffs-Appellees,
Office & P. O. Address,
605-8 Farnam Building,
Omaha, Nebraska.

LOUIS D. FROHLICH, Esq.,
HERMAN FINKELSTEIN, Esq.,
Counsel.

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